IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
ARBITRATION PETITION NO. 354 OF 2004

Union of India,
represented through Chief Engineer,
Navy Mumbai, having his office at
26, Assaye Building, Colaba,
Mumbai 400 005. ... Petitioners

Vs.

M/s. Arctic (India),
7/A, Alfred Street, Richmond
Town, Bangalore 560 025. ... Respondent

Mr. Suresh Kumar with Mr. S.S. Pakale for Petitioner.

Mr. S. Sen i/by Udwadia Ueshi & Co. for Respondent.

CORAM : S.U. KAMDAR,J.
DATED : NOVEMBER 24, 2004

ORAL JUDGMENT :

1. The present petition is challenging an award dated 27.3.2004 under Section 34 of Arbitration & Conciliation Act, 1996. Some of the few facts in the present case are as under :

2. A contract was executed by and between the Petitioner and Respondent in respect of the work of replacing of A.C. placed at INS Karanja. Under the terms of the contract stipulated date for commencement of the work was 30.7.1996 and stipulated date for completion was 20.1.1998. The work however was completed on 1.10.1999. In view of certain disputes and differences between the parties an arbitration Clause being Clause No. 17 of IAFW 2249 was invoked on 27.8.2002 by the respondent herein. On 28.8.2002 letter was

addressed to the Engineer-in-Chief for appointment of arbitrator by the Respondents enclosing therewith the claims which are required to be referred to an Arbitrator. On 21.11.2002 an application under Section 11 for appointment of arbitrator was filed before this court being Application No. 211 of 20012. On 31.1.2003 this court directed the petitioner to appoint arbitrator in accordance with Clause 17 of the Arbitration Clause within the period of six weeks therefrom. Accordingly on 27.3.2003 Shri. TK Saha CE was appointed as arbitrator to decide the dispute between the parties. On 16.4.2003 the arbitrator entered upon the reference. After various meetings and hearings the Arbitrator has published the award on 27.3.2004. On 23.4.2004 the learned Arbitrator amended the award by carrying out certain corrections therein. By the present petition, petitioners are challenging the award of the arbitrator dated 27.3.2004 as amended by further amending the award on 23.4.2004.

. The learned Counsel Mr. Sureshkumar appearing for the Petitioner has placed before me three contentions. Firstly he contended that the Arbitrator has wrongly granted the award of claim of escalation under Item No. 2. It is contended that claim for escalation made by the Respondent partially pertains to the period subsequent to the

date of completion stipulated in the contract. According to him under Clause 11 (c) of the General Terms and conditions of the contract, the arbitrator is not entitled to grant such claim. The learned counsel appearing for the respondents has drawn my attention to the said Claim No. 2. It was an admitted position before the arbitrator and also before me that the petitioner Union has worked out the claim for escalation upto the date of contract to be Rs.8,23,817.56. Mr. Sureshkumar appearing for the Petitioners have accepted that the said figure of Rs.8.23,817.56 mentioned in the award as correct figure for the claim if escalation upto the date of contract and according to him there is no objection in the said amount being granted to the Respondent herein. However, he contends that the Arbitrator has granted claim of Rs.8.76,795.48 which includes the claim of escalation subsequent to the date of the completion of the contract. The learned counsel for the respondent has stated before me that he gives up the claim over and above the claim of Rs.8.23,817.56 and accepts the claim as worked out by the Petitioner. In view thereof, the award to that extent will be required to be modified.

2. In so far as second contention is concerned, the same pertains to granting of claim of interest at the rate of 18% p.a. the learned counsel for

the Petitioner has contended before me that the said claim could not have been granted because 18% is not the current rate of interest. In my view, the aforesaid argument has already been considered by the learned Single Judge in the case of Godrej Properties & Investments Ltd. Vs. Tripura Construction, Mumbai 2003(2)Mh.L.J. 306 in which a similar argument was rejected and it was held that in view of the provisions of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which inter alia provides for granting of interest at the rate of 18% the argument advanced of current rate of interest in respect of awards which are passed subsequent to the enactment of Arbitration & Conciliation Act, 1996 is not valid and accordingly the same argument has been rejected. The Paragraph 8 and 9 of the said judgment are reproduced herebelow :

> "8. That brings us to the last issue in awarded by the Tribunal. There was no provision for interest. In U.P. Co-operative Federation Ltd. Vs. M/s. Three Circles, 2000(3) Mh.L.J. 730=2000(3) Bom.C.R. 360 a Division Bench of this Court after noting the provisions of the Interest Act, 1978 held that insofar as pre-reference interest is concerned, if there was no provision for

interest it would not be more than the current rate of interest. In the instant case, the Arbitral Tribunal has not awarded interest for the pre-reference period. The question then remains in respect of interest pendente lite and after the award. Under Section 31(7) will be a guide in so far as that part is concerned. Under Section 31(7)(a) a power is conferred on the Arbitral Tribunal between the date of cause of action and the date of the Award to "award interest which is reasonable. The Tribunal has awarded 18% interest both to the Petitioner and to the respondents. It is sought to be contended that considering the interest rates now prevailing the interest awarded would be contrary to the public policy of India. It is secondly contended that between the completion of hearing and the date of the Award the period of 9 months had elapsed and in these circumstances a party should not be made to suffer the consequences of delays or the failure by the Tribunal to dispose of the proceedings expeditiously. In sofar as the contention of the public policy is concerned, a perusal of section 31(7)(b) would indicate that where the

Arbitral Tribunal does not award specific interest after the award the interest payable would be at the rate of 18% per annum. Once that being the case, it can safely be said that it is the policy of the law insofar as arbitral proceedings are concerned to award 18% interest. Once it is the policy of the law then the question of holding that reasonable interest pendente lite would be contrary to public policy would be unsustainable. Pedente lite and interest subsequent to the award is interest which the Arbitral Tribunal can award considering section 31(7) itself. This is so affirmed even under the Act of 1940 by the Judgment of the Apex Court in the case of State of Orissa Vs. B.N. Agarwalla, AIR 1997 SC 925 when the Court held that the Arbitrator has jurisdiction to award pre-reference interest, interst pendente lite and post award interest under the Act of 1996 and for that purpose on failure to award interest, statutory, interest is provided at 18% per annum post award. See also Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others. Vs. N.C. Bhudharaj (deceased) by LRs and cannot result in

this Court holding that the amount awarded is unreasonable. The parties went before the forum of their choice. There was no limitation on the forum in deciding the arbitral proceedings. The objection of parties choosing the forum of their choice is no doubt that the matter should be disposed expeditiously. That however, does not mean that once the parties have chosen their forum of their choice and if that forum does not dispose of the matter expeditiously, a party in whose favour the award is made can be denied interest, more so considering section 31(7)(a). It perhaps could be within the jurisdiction of the Arbitral Tribunal considering the delay to award interest in those circumstances which it considered unreasonable, but that is within their exclusive discretion. Once that discretion has exercised, then it cannot be said that the decision is unreasonable as long as the interest awarded does not exceed the contractual rate of interest or where the contract does not so provide in excess of 18%, which is the rate statutorily fixed if the Tribunal does not award interest after the passing of the award. To my

mid, therefore, it will be difficult to hold that the interest awarded is unreasonable.

9. Apart from that on behalf of the respondents their learned Counsel points out that in M/s. Steeman Ltd. Vs. The State of Himachal Pradesh and Ors. JT 1997(3) SC 390 under the Act of 1940 considering the provisions of Section 30 of the said Act a contention was raised that the interest awarded was unreasonable. That contention was rejected as under :-

"Further the jurisdiction of the Court to interfere with the award is confined to matters enumerated in section 30 of the Arbitration Act. We do not think that the last point raised before us would fall within the ambit of section 30 to interfere with the award".

If such challenge was not available under section 30 of the Act of 1940 it will be difficult to hold that such a challenge would be available either under any of the provisions of section 34(2)(a) or

> section 34(2). Insofar as section 34(2)(b)(i) is concerned possibly it could be said that the interest awarded is unreasonable if the interest awarded is contrary to the terms of the contract or exceeds 18% if there be no term in the contrary or any statutory limits if it is so provided. As pointed out above, in this case granting of interest at 18% per annum cannot be said to be against the policy of the law and consequently insofar as the facts of this case is concerned, the amount awarded would not be subject to challenge under section 34(2)(b)(ii)."

3. In view of the aforesaid position in Law, in my view the contention raised by the Petitioner that the current rate of interest being lower, the Arbitrator could not have granted the interest at the rate of 18% requires to be rejected.

4. This leads us to the last contention which has been advanced by the learned counsel for the Petitioner relying upon Clause 67 of the general Terms and conditions of the contract. Said Clause 67 reads as under :

"67. Recovery from contractor :(a) Whenever any claim(s) for payment of sum of money arise(s) out of or under this Contract against the contractor, the Contractor shall on demand make the payment of the same or agree for effecting adjustment from any amounts due to him by the Government. If, however, he refuses or neglects to make the payment on demand, or does not agree for effecting adjustment from any amounts due to him, Government shall be entitled to withhold an amount not exceeding the amount of the claim(s)), from any sum when due or which at any time thereafter may become due to the Contractor,k under this or any other Contract with the Government or from any other sum due to the contractor from the Government (which may be available with the Government) or from the Contractor's Security Deposit or Security Bond amount and retain the same by way of lien till such time payment is made by the Contractor or till the claim(s) is/are settled or adjudicated upon, or till the Contractor, at his expense furnishes fixed Deposit Receipt(s) duly endorsed as directed by the Accepting Officer, or a Guarantee

Bond from a Scheduled Bank for an amount equal to the amount of the claim(s), in the form as directed by the Accepting Officer.

(b) It is an agreed condition o f this Contract that the sum of money so withheld or retained as and by way of lien under this condition by the Government, will be kept withheld, or retained as such by the Government, till the claim(s)) arising out of or under this Contract is/are settled or adjudicated upon and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

(c) For the purpose of this Condition, where the contractor is a Partnership Firm, the amount claimed, any such found payable to any partner of the Firm, whether in his individual capacity or otherwise.

(d) Any amount due to the Contractor under this contract may be withheld by way of lien against any amount claimed or which may at any time hereafter be

claimed by the Government from the contractor on any account whatsoever, under this or any other contract between them and retained, till the claim(s) is/are settled or adjudicated upon.

(e) Government reserve the right to carry out post-payment audit and technical examination of the works and final Bill, including all supporting voucher, abstracts etc. Government further reserve the right to carry out the aforesaid examination and enforce recovery when detected, notwithstanding the fact that the amount of the Final Bill may have been included by one of the parties as an item of dispute before an Arbitrator appointed under the Arbitration clause of the Contract and notwithstanding the fact that the amount of the Final Bill figures in the Arbitrator's award.

(f) If, as a result of such audit and technical examination, any over-payment is discovered in respect of the work done under this Contract, the contractor shall on demand make payment of a sum equal to the amount of over-payment or agree for

effecting necessary adjustment from any amounts due to him by Government. If however, he refuses or neglects to make the payment on demand or does not agree for effecting adjustment from any amounts due to him, Government shall be entitled to take action as in sub para (2) hereinbefore. If as a result of such audit and technical examination any under payment is discovered, the amount of under payment shall be duly paid to the Contractor by Government.

(g) Provided, that, nothing hereinbefore contained shall entitled the Government to recover any over-payment in respect of any price agreed between the C.W.E. or the G.E. and the Contractor under the circumstances specifically prescribed for such method of assessment and that the said right of Government to adjust over-payment from any sum due or from any such which may become due to the Contractor or from Security Deposit or Security Bond amount and adjust under payment,s hall not extend beyond a period of two years from the date, the net amount of the final bill is communicated to the contractor.

(h) All notices under this condition shall be given by the G.E."

5. The learned counsel for the Petitioner relying upon the said Clause 67 has contended that in so far as Claim No. 3 is concerned, which provides for granting of interest of sum of Rs.24,078/- the Arbitrator ought not to have granted the same because according to him under Clause 67(b) the Arbitrator is not entitled to grant interest on the withheld or retained amount by the Government.

6. I have considered the contention on the part of the Petitioner. In my view the said contention has no merits firstly because Clause 67 applies in cases where the payment by the contractor to the Union of India arises out of and under the present contract i.e. the contract in the present case being Contract No. CENM-31 of 96-97 and if such an amount is demanded by the Union of India and the same is not paid by the Contractor then in that even under the said Clause 67 the Union of India is entitled to withheld the said amount from the dues payable to the contractor under any other contract. For application of Clause 67 of the Contract this is a condition precedent. In the present case, the

amount of Rs.16,95,645/- does not arise under the present contract being CENM-31 of 96-97 nor the same has been demanded as such by the Petitioner. It is the case of the Petitioner before Arbitrator as also before me that the said amount has in fact is due and payable by the Respondent to the Petitioner under a different contract being contract No. CENM-26 of 1996-97. According to the Petitioner the said amount has been withheld under this contract. If it is so, then the clause 67 of the present contract has no application because the said claim of Rs.16,95,645/- does not arise in this contract. In my opinion, the said amount of interest granted by the Arbitrator of Rs.24,078/- is therefore, valid and justified. However, learned counsel for the Petitioner has contended that the there is a similar clause 67 also in the contract CENM-26 of 96-97. I find from the record that no such argument was advanced either before the Arbitrator. I also find that even in the present petition, also there is no such contention raised. Assuming that there is similar clause 67 in the contract CENM-26 of 1996-97, thus in that event the said claims has to be raised by the Petitioner in the said contract where amount has been claimed by them and not under the present contract. In the aforesaid circumstances, the arbitrator was justified in releasing the interest of Rs.24,078/-. Apart from aforesaid position on

interpretation of Clause 67 of the general conditions of the contract, the Arbitrator has also given a finding on merits in that the said amount was wrongly withheld and petitioner was not entitled to withhold the said amount at all. The learned Arbitrator has given the said findings which is finding of fact. Once the Arbitrator has given finding of fact that the said amount was wrongfully withheld and therefore, the compensation is liable to be payable, it is not possible to interfere with such findings under Section 34 of the Arbitration & Conciliation Act, 1996. . Thus the Arbitrator was right and justified in awarding the said amount of Rs. 24,078/-.

. Apart from the above, I am of the opinion that the matter of interpretation of Clause 67 of the General terms and conditions of the contract is within jurisdiction of the Arbitrator. As it is now well settled that the interpretation of the contract is exclusive domain of the Arbitrator and the court has no jurisdiction to reconsider the interpretation of the clauses of the contract made by the Arbitration under Section 34 of the Arbitration & Conciliation Act, 1996 even if two views are possible. In the aforesaid circumstances, I find no merit in the present Award save and except that the Award is liable to be modified to the extent that claim of escalation has

to be reduced from Rs. 8,76,795.48 to Rs.8,23,817.56. The interest component will also stand modified accordingly and interest shall be computed by including escalation amount of Rs.8,23,817.56 and not Rs.8,76,795.48. In the aforesaid circumstances, the award stands modified accordingly. Petition partly succeeds and accordingly made partly absolute in the aforesaid terms. No order as to costs. C.C. expedited.

(S.U. KAMDAR,J.)